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Brf. of Humphrey & Davie for P. Co.

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MERCER COUNTY BOND CASE,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

622.

EX-PARTE

The Provident Life and Trust Company, of Philadelphia,
Petitioner.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN OPPOSITION TO PETITION.

ALEXANDER POPE HUMPHREY,
GEORGE M. DAVIE,
Counsel for Mercer County, Respondent.

JOHN B. THOMPSON,
JOHN W. HUGHES,
Of Counsel.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

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The Provident Life and Trust Company, of Philadelphia,

Petitioner.

BRIEF IN OPPOSITION TO THE APPLICATION FOR THE WRIT OF CERTIORARI.

The petition for writ of certiorari in this case and the accompanying brief make up a volume of seventy-four pages. The very length of the brief demonstrates that there is in this case no sharply defined point upon which the petitioner is able to rest its case.

Indeed, from pages 19 and 20 one might justly infer that Congress had made a mistake in not requiring this court to review all opinions involving the validity of municipal bonds. We do not think it necessary to cite from the several cases in this court the principles controlling the granting of a certiorari. It is enough to say that they fully recognize that the Circuit Courts of Appeal were established with the knowledge that their jurisdiction would be large, varied, and

important; that they would be called upon to decide cases of great magnitude and involving new principles as well as the application of old ones. Congress might well have thought, and no doubt did think, that there were certain subjects at least upon which this court had so fully spoken that the new courts would have no great difficulty in following and applying the precedents which had been set for them.

There is no subject to which this court has given more time, thought, and labor than that of municipal bonds. We have had some curiosity to count the citations in the Lawyers' Co-operative Digest of the Reports of this Court on the subject of municipal bonds. These citations, including one hundred and fifty-four United States, are no less than five hundred and eight. We of course do not mean that these are five hundred and eight different cases, because, as most, perhaps all of them involve more than one point, the title will occur more than once in the Digest. At any rate the fact is that upon no subject are the Circuit Courts of Appeal so well instructed by the decisions of this court as upon that of municipal bonds. If they can not be trusted to apply these principles thus illustrated to them, and if this court is to find it necessary to grant the writ of certiorari in cases of this kind, then we can not imagine any class of cases in which the Circuit Court of Appeals should be left the power, duty, and responsibility of final adjudication.

The fact that this court is determined to carry out the view held by the lawmakers in establishing the Circuit Courts of Appeal is strongly evidenced by the overruling at the last term of this court of no less than forty-eight applications for writs of certiorari. How many were granted we do not know. This court refused in at least two instances to review cases of this character, in one of which the Circuit Court of Appeals had held for the bondholder and in the

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other for the county—Quaker City Bank v. Nolan Company, 66 F. R. 883; Mayor of Columbus v. Dennison, 69 F. R. 58.

Coming to the case at bar we do not believe that we are called upon to argue the question as to whether it was rightly or wrongly decided by the learned Circuit Court of Appeals. The decision is reported under the style of Mercer County v. Provident Life and Trust Company of Philadelphia, 72 F. R. 623. The opinion of the learned appellate court was unanimous, and thoroughly reviews the law and the facts. So far as we can recall there is no point made in the petition for a certiorari or the brief accompanying it that was not made before the Circuit Court of Appeals, and considered and passed upon in the opinion of that tribunal. A petition for rehearing was presented and denied. There can be no doubt that this case has been thoroughly tried and patiently and intelligently considered.

The case, briefly stated, is about as follows:

The legislature of Kentucky authorized Mercer County to subscribe to the Louisville Southern Road. The act provided for the taking of a vote upon the question, and the ascertainment of the result of that vote by the county authorities. The act then provided that in the event of success upon the part of those favoring the subscription, the county court should immediately execute bonds and deposit them in the hands of some trustee or trust company, to be held in escrow and not to be delivered until the railroad should have performed a certain precedent condition, which was set forth in the act. The act expressly provided that the bonds should not be valid or binding until the railway should have been completed through the county. It can not be disputed that the condition which the legislature made as precedent to the validity of the bonds has never been fulfilled. The railway was never completed through the county. It can not be dis-

puted that the officers of the law obeyed the terms of the statute by executing the bonds and depositing them with the trustee prior to the time when the precedent condition could have been performed. The bonds recite that they were issued in pursuance of this act. Any one reading the bonds and reading the act would know for a certainty that at the time the bonds were signed with this recital in them the conditions precedent to their validity had not been performed. The county authorities in signing these bonds could not therefore have possibly been construed as stating that such condition precedent had been performed.

The legislature, in authorizing the bonds to be issued, declared in so many words that they should not be valid and binding obligations upon the county until and unless this condition precedent was performed, and further provided that the depositary should not deliver the bonds until the condition precedent had been performed. There is absolutely no recital either in the face of the bonds or upon the back of the bonds that can be tortured into a statement that this condition precedent has ever been performed. The only ground of estoppel, therefore, against the county arises from the fact that the trustee did deliver the bonds. In saying this we do not omit to notice the fact that other grounds of estoppel are alleged; such as paying interest on the bonds for a short while; voting the stock of the railroad company, and the failure upon the part of the citizens of the county to file a bill to enjoin the trustee from delivering the bonds. These, we submit, have been passed upon adversely by this court so often that no citation of authority is necessary, and the matter is fully dealt with in the opinion of the Circuit Court of Appeals.

We have, therefore, the case of an alleged estoppel against the county entirely unaccompanied by any recital, by any

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declaration either in the face of the bonds or upon their back that what was made by the legislature a prerequisite to their validity had ever been performed. The fact that the bonds were delivered by the trustee and are in the open market is no estoppel. Mere delivery is not equivalent to a recital. This also has been so often held by this court that we need cite no authority.

The question, therefore, is bound to present itself as it would if the railroad company were suing on the bonds. In other words, there is no case in this court which has ever held that in the absence of a recital a *bona fide* holder is under less obligation to establish the validity of the bonds than is imposed upon one who had knowledge of the facts. This court has consistently held that as long as there is no declaration upon the bonds in regard to the existence of the requisities to make them valid, the existence of these requisites can be challenged whether the bond is sued upon by the original taker or any transferee from him. In other words, the question of *bona fide* holder has no place in such a discussion.

The fact that it is difficult to ascertain whether or not a condition precedent has been performed is quite beside the question. It is to be expected that as time goes on legislatures will be more and more chary in allowing a mere majority of a community to impose the obligation of municipal indebtedness upon the minority for the benefit of a private corporation. The legislature has the power to give or to withhold its sanction from municipal subscription. It may impose any conditions upon the sanction that seem to it proper. Neither the railroad company nor any purchaser of the bonds has any right to complain that the authority is too narrow or too limited in its scope, or that the facts going to show that the bonds are valid and binding obligations are

difficult to ascertainment or proof. All this is a matter of legislative discretion, and neither the railroad company, the original beneficiary of the sanction of the municipal indebtedness, nor one who chooses, without inquiry, to buy these obligations, has any right to complain. It remains in this case, as is so well set out in the opinion of the Circuit Court of Appeals, that the legislature of Kentucky informed every purchaser of these bonds that the fact that they were signed as complete instruments by the county authorities did not make them the valid obligation of the county, but that notwithstanding such full and complete signature and execution they were not to be the valid or binding obligations of the county until and unless something should occur after such signature and execution, viz., the performance by the railroad company of its part of the contract.

When the legislature directed that the bonds should be deposited with some trustee or trust company it declared that this deposit should be in escrow. Here again we are met with the argument by the petitioner that the legislature did not know what the word escrow meant; that this word is one properly applicable to deeds and not to instruments of this character, and, it is argued, in effect, that as the legislature did not know what the word meant, the courts should properly declare that it did not mean any thing at all. It is not suggested, however, what other word the legislature could have used to make the meaning clearer, nor to express the thought that was evidently in the legislative mind to the effect that delivery being essential to the validity of any instrument, whether of grant or executory contract, there should be no delivery of these bonds unless and until a condition precedent named in the act had first been performed.

It can not be denied, that it is the performance of the condition precedent and not the delivery that gives effect to a deed

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delivered in escrow; that a delivery without the performance of the condition precedent is no delivery at all. We see no reason why exactly the same principles should not be applied to negotiable instruments, provided the public are by something written in or on the negotiable instruments notified that they have been put in escrow. The bonds in the case at bar could not have more plainly indicated this if there had been written across their face a statement to the effect that "this bond, after having been signed by the county authorities, was placed in escrow with a depositary appointed in accordance with law, and the said depositary has neither power nor authority to deliver this bond until and unless the conditions precedent set forth in the act authorizing this bond have been performed." We say that this was written in the face of this bond because the bond declares upon its face that it is issued in pursuance of the act that requires these very things to be done.

We submit that there is no distinction between the character of instruments put in escrow, where the instruments show in their face that they have been put in escrow.

In the face then of the fact that this condition precedent has never been performed; that the petitioner had knowledge of the fact that the bonds were invalid unless it had been performed; that the petitioner might easily have ascertained that it had not been performed; that the petitioner knew from reading the act that if the county authorities followed the law the recital in the bonds, so far from being to the effect that the condition precedent had been performed, was to the effect that it had not, at the date of the signing of the bonds, been performed; that the petitioner knew that the bonds had been put in escrow; that while in escrow they were absolutely invalid because they had never been delivered; that the depositary in escrow had no authority to deliver except on

the performance of the condition, and that there is absolutely no recital any where of the performance of the condition to be found on the bond; it seems to us that the principles laid down by this Court have been strictly followed and applied by the learned Circuit Court of Appeals in the case at bar.

We respectfully ask that the petition be denied.

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For Respondent.

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